United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

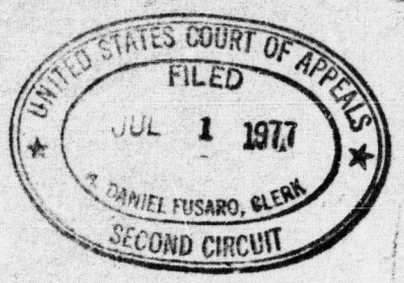
77-7180

To Be Argued By
ROBERT L. JAUVTIS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner-Appellee,

- against -

KENTILE FLOORS, INC.,

Respondent-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF PETITIONER - APPELLEE

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner-Appellee
1501 Broadway
New York, New York 10036
(212) 354-8330

ROBERT L. JAUVTIS
Of Counsel

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Petitioner-Appellee,

-against-

KENTILE FLOORS, INC.,

Respondent-Appellant.

Appeal No: 77-7180

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BRIEF OF PETITIONER - APPELLEE

PRELIMINARY STATEMENT

This memorandum is submitted on behalf of Petitioner-Appellee, District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter the "IAM"). Respondent-Appellant, Kentile Floors, Inc. (hereinafter "Kentile"), appeals from a judgment rendered by Judge Brieant of the United States District Court for the Southern District of New York, entered on March 17, 1977, which granted the IAM's petition to confirm an arbitration award and denied Kentile's cross-petition to vacate that award in part.

FACTS

The IAM and Kentile are parties to a collective bargaining agreement (hereinafter "Agreement"), which is

currently effective to July 8, 1978 (A-11)*. On December 5, 1975, Kentile summarily discharged two employees, Stephen Jute and William Anzueta, represented by the IAM, for their failure to work overtime requested of them late that day.

The discharges were grieved by the IAM (A-41, 42), and were eventually submitted to arbitration in accordance with the Agreement (A-20). Under the auspices of the American Arbitration Association, the parties mutually agreed upon Bertram Kupsinel, Esq., an experienced labor arbitrator, to hear and determine the dispute.

The issue submitted to the arbitrator was:

> "Whether or not Stephen Jute and William Anzueta were discharged for just cause, and, if not, what shall be the remedy?"
> (A-23).

The IAM contended that the grievances should be sustained and the two men restored to their employment with full back pay and with no loss of other benefits. Kentile, of course, argued to the contrary.

On July 1, 1976, the arbitrator issued his award, reducing the discharge of Stephen Jute to a two-week suspension and that of William Anzueta to a one-week suspension. He further

* Refers to the Appendix on Appeal.

awarded reinstatement with back pay for the period of separation (minus the time designated as a suspension) plus interest on the total back pay at the rate of six percent (6%) per annum from the dates the "suspensions" should have ended to the dates of reinstatement. Additionally, there was to be a deduction of any money earned during the period of separation (A-31, 32).

After approximately an eight month separation from Kentile, both men were reinstated and the back pay was remitted (A-38). One of the men had a large deduction for interim earnings. However, Kentile refused to pay the 6% interest mandated by the award. Over the course of the next four months, the IAM made three written inquiries as to why the interest payment was not forthcoming (A-56-58). Finally, on December 3, 1976, Kentile first responded, stating that, "Mr. Kupsinel exceeded his authority as arbitrator." (A-59).

Thereafter, the IAM petitioned to confirm the award pursuant to Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185 and the U. S. Arbitration Act, 9 U.S.C. §1, et seq. (A-6). Kentile cross-petitioned to vacate that part of the award which granted pre-award interest on the back pay (A-34). The parties agreed that the amount in question was $377.00.

On March 16, 1977, Judge Brieant issued a brief (unreported) written opinion wherein he stated, inter alia, that:

"The stipulated submission to the arbitrator did not on its face or by implication limit his authority, or the nature and scope of the remedy he could grant. It will not be disturbed."

(A-61).

Accordingly, the award was confirmed in its entirety (A-62).

THE ISSUE PRESENTED

Is an award by a labor arbitrator granting pre-award interest on back pay, where neither the collective bargaining agreement nor the stipulated issue limit the relief which may be granted, to be denied enforcement?

The IAM submits that the answer is No.

ARGUMENT

POINT I

THE ARBITRATOR'S AWARD OF INTEREST ON THE BACK PAY DUE WAS WITHIN HIS AUTHORITY AND SHOULD NOT BE DISTURBED.

In opposing confirmation of that part of the award which granted pre-award interest on the back pay due, Kentile has claimed that the direction for interest was made in excess of

the arbitrator's authority and may be vacated. The IAM submits that Judge Brieant properly found that the arbitrator acted within his powers, even if he might have disagreed with the result.

It is well-established national labor policy that arbitration awards are subject to extremely limited review. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). The oft-repeated test to determine whether an arbitrator has exceeded his powers has been stated as follows:

> "Unless this award manifests a clear infidelity to the arbitrator's obligation of drawing the essence of the award from the collective bargaining agreement this court must refuse to substitute its judgment on the merits for that of the arbitrator. Such an infidelity occurs, however, where the arbitrator clearly exceeds the authority expressed in the agreement or deviates from the unambiguous provisions contained therein." (Emphasis supplied.)
>
> (Nuest v. Westinghouse Air Brake Co., 313 F. Supp. 1228 (SD Ill. 1970), at 1236).

For the purposes of analogy, the test applied in the New York state courts has been summarized as follows:

> "There are two basic factors which have been considered in determining whether an arbitrator acted in excess of his power. First, was the construction given the contract document by the arbitrator completely irrational (Lentine v. Fundaro, supra, p. 385, 328 N.Y.S. 2d pp. 421-422, 278 N.E. 2d P. 635, Matter of National Cash Register Co. [Wilson], 8 N.Y. 2d 377, 383, 208 N.Y.S. 2d 951, 955-956, 171 N.E. 2d 302, 305), and, second, did the

contract agreement itself expressly limit the power of the arbitrator (Lentine v. Fundaro, supra, 29 N.Y. 2d pp. 385-386, 328 N.Y.S. 2d pp. 421-423. 278 N.E. 2d pp. 635-636; Matter of Granite Worsted Mills [Cowen], supra, 25 N.Y. 2d pp. 456-457, 306 N.Y.S. 2d pp. 938-939, 255 N.E. 2d pp. 170-171)? In effect, the questions can be stated as follows: Did the arbitrator merely interpret the existing Agreement or did he, in fact, create a new contract (Matter of National Cash Register Co. [Wilson], supra, 8 N.Y. 2d p. 383, 208 N.Y.S. 2d pp. 955-956, 171 N.E. 2d p. 305)?"

(CSEA v. County of Steuben, 50 App. Div. 2d 421, at 425 (4th Dept. 1976), 377 N.Y.S. 2d 849, at 853).

See, also: Rochester City School District v. Rochester Teachers Association, 41 N.Y. 2d 578 (1977).

With the above in mind, the Court's attention is directed to the following pertinent factors:

A) The Collective Bargaining Agreement.

As in most collective bargaining agreements, the subject Agreement is silent with respect to the arbitrator's range of remedies relating to employee discipline. Indeed, no mention of the remedy of reinstatement for unjust discharge is made. Nor is there mention of possible back pay. Kentile concedes that these remedies are proper. It is simply anomolous to argue that the arbitrator may award reinstatement and back pay without specific, written contractual authorization but interest as part of the back pay remedy may not be awarded absent this specific authorization.

In discussing the subject of an arbitrator's remedial powers, Archibald Cox noted:

"Arbitrators frequently fashion remedies for breach of a collective agreement without a shred of contract language to guide them. Although a few agreements prescribe the remedy for an unjust discharge, the majority simply forbid discharge without just cause. Despite earlier court decisions to the contrary, it is generally understood that such a contract gives the arbitrator authority to order reinstatement with or without back pay. In a case arising at International Harvester Co., W. Willard Wirtz held that he had authority to formulate a measure of damages when the employer violated the contract by failing to tell employees the piece rates at the start of a shift when they were transferred to temporary jobs. At least one arbitrator has imposed monetary penalties for breach of a no-strike clause.

The arbitrator's power to fashion remedies is so generally accepted today that these cases can be explained by saying that the power to determine whether a collective bargaining agreement has been violated carries the implied power to grant a remedy for the violation. The implication, however, rests upon the dictates of necessity. The power is essential to the successful functioning of the institution. Not a word in the average labor contract expresses the intention."

(See Cox, "Reflections upon Labor Arbitration in Light of the Lincoln Mills Case" in Arbitration and the Law, BNA, Inc., 1959, at 38-39.)

Arbitrators are traditionally permited wide latitude in formulating remedies for contractual violations. In Mogge v. District No. 8, IAM, 454 F. 2d 510 (7th Cir. 1971), the arbitrator found the grievant's discharge to be without just cause. No specific remedy for the violation was provided for in the contract. The arbitrator awarded reinstatement and back pay for 100 weeks.

He characterized the monetary award as "in the nature of liquidated damages", since it was difficult to determine the grievant's actual damages over the 260 week period from the time of her discharge to the date of his award. The court was faced with the question of whether the arbitrator's award exceeded his contractual authority. It concluded as follows:

> "The remaining question concerns the propriety of the arbitrator's remedy, that is his ordering reinstatement with 100-weeks back pay. District No. 8 calls this award of back pay speculative because the arbitrator labeled it as 'in the nature of liquidated damages'. The arbitrator so labeled this award, as hereinbefore pointed out, because of the difficulty in determining actual unmitigated damages suffered by Mogge. This is nothing more than a disagreement with the arbitrator's considered judgment. The Supreme Court has given the duty of fashioning a just remedy to the privately selected arbitrator. Enterprise Wheel, supra, 363 U.S. at 597, 80 S. Ct. 1358.
>
> The reported decisions make it abundantly clear that where the contract is not explicit concerning the proper remedy, the arbitrator is given wide latitude in fashioning an appropriate remedy. Enterprise Wheel, supra; Int'l. Ass'n. of Machinists, District No. 8 A.F.L.-C.I.O. v. Campbell Soup Co., 7 Cir., 406 F. 2d 1223, cert.denied, 396 U.S. 820, 90 S. Ct. 57, 24 L. Ed. 2d 70 (1969); and Lodge No. 12, Dist. 37, Int'l. Ass'n. of Machinists v. Cameron Ironworks, 5 Cir., 292 F. 2d 112, cert. denied, 368 U.S. 926, 82 S. Ct. 361, 7 L. Ed. 2d 190 (1961). 'When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.' Enterprise Wheel, supra, 363 U.S. at 597, 80 S. Ct. at 1361"
>
> (at 514-15).

The IAM submits that the remedy of back pay with interest to date of reinstatement neither clearly exceeds the authority expressed in the agreement nor deviates from the unambiguous provisions contained therein.

The Agreement contemplates the finality of the arbitrator's award. Article 27.1 thereof states:

> "The decision of the arbitrator shall be final and binding on both parties and shall conclusively determine the subject of the arbitration for the duration if this Agreement."
>
> (A-20).

Accordingly, the parties bargained for an Agreement which gave an arbitrator wide latitude to fashion an appropriate remedy, one which was to be final and binding.

B) The Issue Presented.

At the arbitration hearing, the parties stipulated to the issue:

> "Whether or not Stephen Jute and William Anzueta were discharged for just cause, and, if not, what shall be the remedy?"

Kentile obviously did not seek to limit the arbitrator's remedial powers via the submission, although it was aware of the Agreement's silence on the remedy.

It should also be noted that the arbitrator was chosen by mutual agreement of the parties in accordance with American Aribitration Association procedures. If Kentile was not familiar with the "track record" of this particular arbitrator, it was incumbent upon Kentile to make inquiry as to his possible views on appropriate remedies. Arbitrators are tradiationally chosen based upon their reputation and, quite candidly, on what the party making the selection percieves their ideologies to be.

Respondent did not exercise its prerogative to limit the submission. It should not now be allowed to attack the latitude it freely gave the arbitrator. See, Elkouri, How Arbitration Works, Third Edition, BNA, Inc.,1973, at 186-190, 244.

C) The Relief Sought.

There are no pleadings in labor arbitration proceedings. There is no statutory necessity to state each and every item of relief sought with particularity. It is not uncommon for the grieving party to merely generalize the relief sought or even, on occasion, to simply leave it to the wisdom and judgment of the arbitrator.

In this case, the IAM requested "that the grievance should be sustained and the grievants restored to their employment with full back pay and with no loss of other benefits." (A-49).

If the IAM might have omitted the magic words "with interest", this should not preclude the granting of same. Arbitration practice is specifically geared to less procedural formality than court litigation.

D) Authority for the Relief Granted.

Kentile makes much of the fact that the arbitrator cited a case arising under the LMRA, Isis Plumbing & Heating Co., 138 NLRB 716 (1962), in support of his finding that interest at the rate of 6% per annum would be added to the back pay due. This, Kentile argues, must mean that the arbitrator's award did not draw its "essence from the collective bargaining agreement."

However, the evident purpose of the entire remedy was to make the affected employees whole for lost use of wages, which falls within the terms of the Agreement since wage rates are an integral part thereof. Cf. Minute Maid Company v. Citrus, Cannery, Food Processing Workers, etc., 331 F. 2d 280 (5th Cir. 1964). The arbitrator never presumed to state that he was bound by National Labor Relations Board ("NLRB") procedures. The citation of Isis was merely illustrative of the attempt by the arbitrator to standardize a back pay computation in accordance with accepted legal principles. As a matter of fact, the Isis decision relies upon "accepted legal and equitable principles." Id. at 719.

Arbitrators do not function in a vacuum and commonly refer to general principles of law in such areas, for example, as evidence, interpretation of language, and damages. Kentile no doubt agrees with the IAM that it was proper to deduct wages earned from outside employment during the back pay period (A-31). The right of the arbitrator to do this is not spelled out in the Agreement; it emanates from general legal principles concerning damages. See Elkouri, How Arbitration Works, supra, at 357-58. Mitigation of damages is also a part of NLRB practices. The mere fact that an arbitrator looks to general legal principles in aid of the resolution of a dispute under a collective bargaining agreement does not evidence an infidelity to that document.

There are a number of reported arbitration decisions where pre-award interest on back pay was granted.

In General Electric Company, 39 L.A. 897 (1962), the issue of interest on a back pay award was specifically addressed by the arbitrator, who stated:

> "C.The Union's request that M- receive interest on each pay period 'installment' of his 'back pay' award, computed from the pay day for each such pay period to the date of his reinstatement, stands on solid legal ground and is granted. Interest at the 'legal' rate is awarded on amounts, recovered in breach of contract actions, where the amount is 'liquidated', or may be 'liquidated', as here, by computation."
>
> (at 906)

Later, in Allied Chemical Corporation, 47 L.A. 686 (1966), the three-person arbitration board awarded 6% interest on the back pay directed, reasoning that interest was part of the "common law" of damages for wrongful suspension or discharge, and, in the absence of language in the collective bargaining agreement to the contrary, should be awarded. See, also, Reynolds Metals Company, 54 L.A. 1187 (1970); Hollander & Co., 66 L.A. 816 (1975). Regarding the cited awards, none, to the IAM's knowledge, has been vacated.

Even if the Court were to conclude that an error of fact or law were committed, such would not support a vacatur. Office of Supply, Government of the Republic of South Korea v. New York Navigation Co., Inc., 469 F. 2d 377, 379 (2d Cir. 1972). Since Kentile is obviously aware of reported labor arbitration decisions allowing interest, it cannot plead "surprise" to such an award. At the hearing, it could have asserted to the arbitrator that any conceivable back pay award would not justify interest thereon.

The authorities relied upon by Kentile to support its view that pre-award interest is not justified are readily distinguishable. In Meat & Allied Food Workers Local No. 248 v. Packerland Packing Co., 411 F. Supp. 1280 (ED Wis. 1976), there was no issue concerning pre-award interest granted by an arbitrator; rather, the court merely sanctioned post-award

interest upon confirmation. In Local Union No. 179 United Textile Workers of America v. Western Textile Products Company, 374 F. Supp. 633 (ED Mo. 1974), the court merely found that neither the arbitration award nor the LMRA expressly authorized post-award interest. Furthermore, on the issue of post-award interest, this case conflicts with Packerland Packing Co., supra, cited by Kentile. Finally, in Western Electric Company v. Communications Equipment Workers, Inc., 409 F. Supp. 161 (DC Md. 1976), post-award interest was denied because the award was not binding when rendered, in accordance with the collective bargaining agreement.

In light of the well-established national labor policy allowing arbitrators to fashion a wide variety of remedies, the lack of limitation on the remedy in the Agreement, the invitation to fashion a remedy explicit in the parties' submission to the arbitrator and reasoned precedent, enforcement of the 6% interest award (the legal interest rate pursuant to New York CPLR §5004) is warranted.

POINT II

IT IS THE POLICY OF THE COURTS TO SUPPORT THE FINALITY OF ARBITRATION AWARDS.

Recently, this Court affirmed its longstanding view that its role in resolving disputes under collective bargaining agreements was narrowly circumscribed. In Local 771, I.A.T.S.E. v. RKO General, Inc., 546 F. 2d 1107 (2d Cir. 1977), the Court stated:

> "We long ago recognized that our limited role in reviewing arbitration awards is necessary to preserve the bargained-for purposes of arbitration, which is the avoidance of litigation and its concomitant costs and delays. Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F. 2d 805 (2d Cir.), cert. denied, 363 U.S. 843 (1960)."
>
> (at 1113)

Over a century ago, the U. S. Supreme Court recognized that if courts were to sanction review of arbitration awards on the merits, such a policy would make the award the commencement, not the end, of litigation. Burchell v. Marsh, 58 U.S. 344 (1854). See, also: Margetta v. Pam Pam Corp., 354 F. Supp. 148, 160 (ND Cal. 1973), vacated on other grounds, 501 F. 2d 179 (9th Cir. 1975).

As a practical matter, the award in issue is not necessarily precedent for future arbitrations involving employee discipline and it is highly unlikely that Kentile will select

arbitrator Kupsinel to again hear such a dispute. Accordingly, the IAM believes that placing this matter, involving the sum of only $377.00, before the Court of Appeals, is simply counter-productive to the ongoing grievance and arbitration process. The award in issue is well within the permissible bounds of the arbitrator's authority, and should stand.

CONCLUSION

For all of the foregoing reasons, this Court is urged to affirm the judgment below in its entirety.

Respectfully submitted,

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner-Appellee
1501 Broadway
New York, New York 10036
(212) 354-8330

ROBERT L. JAUVTIS,
Of Counsel

June 28, 1977

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ROBERT L. JAUVTIS, being duly sworn, deposes and says:

1. I am not a party to this action, am over eighteen years of age and reside at 230 East 79th Street, New York, New York 10021.

2. On Tuesday, June 28, 1977, I served two (2) copies of the annexed Brief of Petitioner - Appellee by first-class mail upon the attorneys for Respondent - Appellant at the address designated below:

Fellner and Rovins
230 Park Avenue
New York, New York 10017

ATT: Carl A. Schwarz, Jr., Esq.

Robert L. Jauvtis
Robert L. Jauvtis

Sworn to before me this
28th day of June, 1977.

CAROLYN M. WHITE
Notary Public, State of New York
No. 03-4625369
Qualified in Bronx County
Commission Expires March 30, 1978